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Supreme Court, U.S.
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CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1986

MICHAEL L. MATTINGLY — PETITIONER

Versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 20, 1987

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

Whether Respondent's Retrial was a violation of the Double Jeopardy Clause of the U.S. Constitution where the evidence at the first trial was incompetent hearsay but was not insufficient to sustain a verdict of guilt.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Kentucky Supreme Court is set out in the petitioner's Appendix.

JURISDICTION

Petitioner seeks review pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether Respondent's retrial was a violation of the double jeopardy clause of the U.S. Constitution where the evidence at the first trial was incompetent hearsay but was not insufficient to sustain a verdict of guilt.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Federal Constitution.

COUNTERSTATEMENT OF THE CASE

The petitioner was convicted of receiving stolen property over $100 and of being a second-degree persistent felony offender, and his punishment was fixed at ten (10) years' imprisonment.

The conviction was reversed by the Kentucky Court of Appeals but was affirmed by the Kentucky Supreme Court on discretionary review. The petitioner brings to this Court a Petition for Writ of Certiorari.

The first Commonwealth witness was Elizabeth Poynter (Transcript of Evidence, hereinafter TE, 60). She stated that on the morning of August 1, 1984, she saw a tractor trailer go by her house with three (3) Ford tractors on it (TE I, 61-62).

Dale Mink testified he talked to the police about seeing a large Ford U-Haul about Noon on August 1, 1984, (TE, 70).

William Ashley Welch testified that a man came to rent a U-Haul truck at the service station where he works (TE, 108). The name given to rent the truck was Michael Mattingly (TE, 109). When returned, the truck had dirt tracks on it like a tractor would leave (TE, 113-114).

Roy G. Cooper testified he owns the service station where the U-Haul truck was rented (TE, 126-127). There was no debris in the truck prior to its being rented (TE, 128). Mud and dirt tracks were

in the truck when it was returned (TE, 129). The truck was rented to Michael Mattingly (TE, 130).

Wilbur Hannah testified he owns a farm machinery dealership and that three tractors were taken from his lot July, 1984, (TE, 151).

Officer Kenny Upchurch testified that after he got the report of the stolen tractors, he looked into the back of a U-Haul and saw the dried tractor tracks (TE, 162). The petitioner was placed under arrest about 30 minutes later (TE, 164). He made a courtroom identification of the petitioner (TE, 165). The Ford tractor key was found half-way between the driver's door and the end of the U-Haul (TE, 166). The key was handed to him by Jim Richardson, a volunteer fireman (TE, 172). Det. Mike Walters with the Sheriff's Department testified that he took fingerprints of the tractor trailer (TE, 185). He also took a tar substance off the license

tag (TE, 187). All evidence was sent to the crime lab in Frankfort (TE, 188).

The next witness was Jim McWhorter who testified he received debris samples and fingerprints from Det. Walters (TE, 194).

Det. Karl Clinard testified that he made plaster casts of some footprints (TE, 196). Det. McWhorter sent the casts to Frankfort (TE, 198).

Det. Doug Silvers testified he took soil samples from the area where the tractor trailer and three (3) farm tractors were found (TE, 203).

Barbara Wheeler at the Kentucky Crime Lab testified she received a left and right shoe plaster cast and soil samples (TE, 206).

Roger Heath testified that he saw a U-Haul truck on Blue John Road twice on the same day (TE, 228). He saw it go to Jim Goldson's house (TE, 230). Heath made an incorrect identification of the driver (TE, 231).

The next witness was Oma Claunch who saw the U-Haul on Elrod Road (TE, 247).

The next witness was Billy Price (TE, 261). He testified he also saw the U-Haul coming from Elrod Road (TE, 262).

The next witness was Potter Langdon who stated he saw a U-Haul truck on Blue John Road (TE, 272). About 5 to 10 minutes elapsed, and he saw it come back (TE, 274).

Russell Goff, a Pulaski County Deputy Sheriff, testified he became involved in the investigation from reports of a tractor trailer truck parked off the Elrod Road and a U-Haul making trips back and forth from it (TE, 281). The license number of the tractor-trailer was run through a computer, and it came back stolen. Id. The Ford tractor was found nearby in a clump of trees (TE, 282). The tractor was also found to be stolen (TE, 282). Two (2)

tractors were found at Goldson's house, and they were found to be stolen (TE, 285).

The next witness was Sarah Goldson, the wife of Jim Goldson (TE, 302). She stated that she saw a vehicle which looked like a U-Haul outside her house (TE, 304).

Sheriff John Adams stated that he dispatched several officers to Elrod but did not go himself then (TE, 308). Later he went to the scene and read Petitioner his rights (TE, 313). He identified a Ford tractor key which he received from Officer Upchurch (TE, 317).

Jim Richardson testified that he found a key alongside a street in Burnside (TE, 325). The object was found between the driver's door of the U-Haul truck and the street (TE, 339). He made an in-court identification of the key (TE, 340).

John Adams' testimony was put into evidence by avowal where he stated that Petitioner was in a

ine-up and Goldson could not pick him out (TE, 43-344).

Det. Mike Walters identified a key that was given o him by Deputy Charles Thompson (TE, 346). etitioner's shoes were also taken in evidence (TE, 47). He also received plaster casts from Karl linard which were placed in a box with the rest of he evidence (TE, 348). All of the evidence was iven to Det. McWhorter to transport to Frankfort TE, 349).

Ronnie Freels who works for the crime lab estified he received athletic shoes and a plaster ast from Detective McWhorter (TE, 355-356).

Deputy Sheriff Charles Thompson testified that he as handed a key to a Ford tractor at Burnside by ohn Adams (TE, IV, 373). He gave the key to Mike alters. Id.

The defense then presented its case and called fficer Kenneth Upchurch to the stand (TE IV, 377).

The jury found the petitioner guilty of receiving stolen property over $100 and his punishment was fixed at five (5) years' imprisonment (TE IV, 433).

At the PFO phase of the trial, Det. Mike Walters testified that he processed Petitioner after he was arrested and his birthdate was 5/3/45 (TE IV, 441).

Probation and Parole Officer Ann Dick testified that Mattingly had previously been convicted in Hardin County of attempt to commmit first-degree robbery, and he was sentenced to six (6) years imprisonment on April 26, 1976, (TE IV, 443). She stated she obtained all this information from a telephone call (TE IV, 445).

A jury verdict found Petitioner guilty on the PFO count and his punishment was fixed at ten (10) years' imprisonment (TE IV, 451). The court granted a new trial of the PFO phase pursuant to Petitioner's motion. (TE IV, 456).

Ann Dick testified the petitioner was found guilty of receiving stolen property over $100 and received five (5) years' imprisonment (TE IV, 469).

Walter Butler with the Department of Probation and Parole in Elizabethtown testified that he could identify Petitioner since he was his probation officer in Hardin County (TE IV, 474). Petitioner was convicted of robbery in the first degree and received a six (6) year sentence (TE IV, 475). He was shock probated on October 27, 1977, and the probation period expired October 23, 1982. Id. The date of the offense was January 6, 1976, and date of birth was May 3, 1945. (TE IV, 476). The crime was committed on January 6, 1976, and the date of conviction was March 19, 1976. Id.

Barbara Mattingly testified for the defense (TE IV, 481). She stated her husband has multiple sclerosis but it is now in remission (TE IV, 489-490).

On the petitioner's own admission, he filed the grounds and motion for a new trial. (TE IV, 456).

It has been held that double jeopardy does not prevent retrial when a new trial is granted at the request of the defendant. Oregon v. Kennedy, 456 U.S. 667 (1982); Allen v. Commonwealth, Ky., 114 S.W.2d 757 (1938).

In a decision rendered December 18, 1986, the Kentucky Supreme Court held that reversal of a PFO conviction on grounds that the only evidence sufficient to sustain the conviction was improperly admitted hearsay did not bar retrial on double jeopardy grounds. It further remanded the case to the Court of Appeals for consideration of the other issues raised by petitioner before that court. Commonwealth v. Mattingly, Ky., 722 S.W.2d 288, 289 (1986).

On February 20, 1987, the Court of Appeals of Kentucky issued an opinion reversing petitioner's receiving stolen property conviction on the basis of trial court errors in seating the jury. Mattingly v.

Commonwealth, Ky.App., ___ S.W.2d ___ (rendered February 20, 1987) (Appendix A).

Pursuant to this decision, the case was remanded to the Circuit Court for retrial. On March 6, 1987, the respondent filed in the Kentucky Supreme Court a motion seeking discretionary review of the decision of the Court of Appeals. (Appendix B).

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS NO JURISDICTION TO REVIEW NON-FINAL RULINGS OF A STATE COURT

Petitioner seeks review of a judgment of the Supreme Court of Kentucky pursuant to 28 U.S.C. § 1257(3). Jurisdiction under 28 U.S.C. § 1257(3) is limited to the review of final judgments entered by the highest court of a state. The judgment of Kentucky's Supreme Court which petitioner is challenging is not final for purposes of review by this court.

The current procedural posture of petitioner's case is quite complex. The decision of the Supreme Court of Kentucky upholding his persistent felony offender conviction also remanded the case to the Kentucky Court of Appeals for consideration of other alleged trial errors. Commonwealth v. Mattingly, Ky., 722 S.W.2d 288 (1986). On remand, the Court of Appeals reversed petitioner's underlying conviction for receiving stolen property and ordered a new trial. Mattingly v. Commonwealth, Ky.App., ___ S.W.2d ___ (rendered February 20, 1987). Under Kentucky law, a defendant cannot be convicted as a persistent felony offender without a concurrent conviction on a new felony offense. KRS 532.080(1) (Appendix C). Therefore, reversal of the petitioner's underlying conviction has the effect of automatically reversing his persistent felony offender conviction as well. The decision of the Kentucky Supreme Court upholding petitioner's persistent felony offender conviction has now been undercut by a Court of Appeals' reversal

on grounds unrelated to petitioner's double jeopardy claim.

Even the Court of Appeals' decision remanding the case for a new trial is not yet final. Respondent, by a motion for discretionary review, has asked the Supreme Court of Kentucky to review the decision by the Court of Appeals. That motion has not been ruled on by the Kentucky Supreme Court. Review by the Kentucky Supreme Court would reopen the judgment of the Court of Appeals. If the Court of Appeals' decision is reversed by the Kentucky Supreme Court and petitioner's convictions (both underlying and persistent felony offender) are reinstated, his double jeopardy claim will survive.

If, on the other hand, the Court of Appeals' decision reversing the underlying conviction stands, a new trial will be necessary. The result of that new trial will either render petitioner's double jeopardy claim moot or preserve it for further review. If petitioner is acquitted on the underlying

felony charge, the state cannot try him on the persistent felony offender charge. The double jeopardy issue will be moot and petitioner will not have been harmed by this court declining to review the case. If petitioner is again convicted on the underlying offense, and then tried on the persistent felony offender charge, his double jeopardy claim will survive. Petitioner will never be put in the position of being convicted on the persistent felony offender charge without having the opportunity to present his double jeopardy claim for review.

Clearly, this is not a case where there is nothing more of substance to be decided in the state courts. Construction Laborers v. Curry, 371 U.S. 542 (1963). Furthermore, the possibility that the matters still open in the state court may generate additional constitutional questions works against a finding of finality in this case. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 71 (1948).

Considerations of efficiency, judicial restraint and federalism require a strict application of the finality doctrine. Pennsylvania v. Ritchie, ___ U.S. ___ (February 24, 1987, dissent by Justice Stevens); Local No. 438 Construction and General Laborers Union v. Curry, 371 U.S. 542, 550 (1963); and Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). The strict application of the finality requirement is further supported by this court's policy of avoiding unnecessary and premature constitutional decisions. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 71 (1948). Petitioner has the burden of affirmatively establishing that this court has jurisdiction to hear this case. Id. at 70. He has failed to do so. He has not established that this case fits into any of the limited exceptions to the finality doctrine recognized in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Any doubt as to the finality of a state court judgment must be resolved against jurisdiction. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 71 (1948).

II.

THE PETITIONER'S RETRIAL WAS NOT A VIOLATION OF THE DOUBLE JEOPARDY PROVISION OF THE FEDERAL CONSTITUTION

The information concerning the petitioner's prior conviction, which was attempt to commit first degree robbery and a six (6) year sentence, was obtained over the telephone from the Hardin Circuit Court probation officer.

The petitioner contended below that because a second trial was held on the PFO portion of his trial, that this trial was barred by the double jeopardy prohibition. However, the Commonwealth relies on the case of Hobbs v. Commonwealth, Ky., 655 S.W.2d 472 (1981), which states as follows:

> "In short, reversal for trial error, as distinquished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been

> convicted through a judicial process which is defective in some fundamental respect e.g. incorrect receipt or rejection of evidence, incorrect instructions or prosecutorial misconduct." (Emphasis added).

In the case at bar, the information obtained over the telephone was evidence incorrectly received. This was not unlike any other trial error like those listed in Hobbs which necessitated a retrial. Hobbs is controlling here.

The respondent respectfully submits that the Kentucky Court of Appeals misconstrued two (2) cases: Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), and Hon v. Commonwealth, Ky., 670 S.W.2d 851 (1984). The Kentucky Supreme Court agreed. In both cases there was evidentiary insufficiency. In Hon it was held that because there was insufficient evidence the appellant was over 18 at the time of the prior offense, a retrial would, in effect, constitute double jeopardy. In Hudson it was held that the double jeopardy clause is violated by prosecuting a defendant a second time after the trial judge at the first trial granted the motion for a new

trial on the ground the evidence was insufficient to support the judge's guilty verdict. Unlike Hudson and Hon, the evidence in the case at bar was not insufficient--it was incompetent. In a published double jeopardy opinion, the Court of Appeals turned trial error into evidentiary insufficiency. This case should be reversed. Simple trial error has been confused with evidentiary insufficiency.

III.

EVIDENTIARY INSUFFICIENCY VS. TRIAL ERROR

A judgment of conviction reversed for trial error does not bar reprosecution by the government. U.S. v. Altamirano, 633 F.2d 147 (9th Cir. 1980). The double jeopardy clause bars retrial after reversal for evidentiary insufficiency, but not after reversal for trial error. U.S. v. Harmon, 632 F.2d 812 (9th Cir. 1980).

In Greene v. Massey, 437 U.S. 19 (1978), it was held that Burks v. U.S., 437 U.S. 1 (1978), precludes a second trial once a reviewing court has determined

that the evidence introduced at trial is insufficient to sustain the verdict. Of course, in the case at bar the evidence was not insufficient. It was incompetent.

The petitioner's argument to the contrary, there is no conflict among the federal and state courts. The cases cited by Petitioner involve genuine questions of evidentiary insufficiency. They do not involve simple trial error in the admission of incompetent evidence as in the case at bar.

There is a Kentucky case which disposes of this issue known as Phillips v. Commonwealth, Ky. App., 600 S.W.2d 485, 486 (1980). The witness, Nally, had refused to answer any questions of the prosecution and indicated he would refuse to answer any question on cross-examination by Appellant. The court stated:

> Over objection of Appellant, a police officer was allowed to testify as to statements made by Nally during investigation of the case and which incriminated Appellant... Appellant further contends that absent the incriminating out-of-court statements of the witness,

> Nally, the evidence was insufficient to support a verdict of guilty and under the rule announced in Commonwealth v. Burris, Ky., 590 S.W.2d 878 (1979), a new trial is now precluded and the indictment must be dismissed. The rule in Burris brings Kentucky law in compliance with the decision of the U.S. Supreme Court in Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). It was held that the double jeopardy provision of the U.S. Constitution prevented retrial of a defendant whose conviction was reversed upon the grounds that the evidence produced at the trial was insufficient to support the verdict of guilty.
>
> Burks does not prohibit retrial where the judgment of conviction is reversed for trial errors other than insufficiency of evidence. We will not extend the rationale of Burks and Burris to the situation presented here.

In both the case at bar and Phillips the evidence was incompetent, and in both cases the appellant contended that without the incompetent evidence the evidence was insufficient to support a verdict of acquittal. In Phillips the court rejected this argument and likewise it should have done so in the case at bar also.

In the case at bar, the evidence received over the telephone was not insufficient--it was just incompetent. This was simply a case of trial error and not evidentiary insufficiency.

CONCLUSION

The Petition for Writ of Certiorari should be denied

Respectfully submitted,

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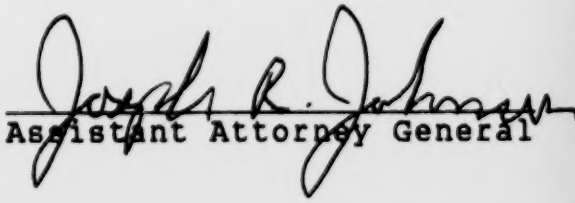
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Counsel for Respondent, hereby certify that this Brief for Respondent in Opposition to Petition for Writ of Certiorari was served on Petitioner by depositing copies thereof in the United States Mail, first-class postage prepaid, on March 20, 1987, addressed to Hon. James L. Pate, Pate, Bailey & Rigney, P. O. Box 248, Elizabethtown, KY 42701, Attorney for Petitioner, and Hon. Roger T. Rigney, Pate, Bailey & Rigney, P. O. Box 248, Elizabethtown, KY 42701, of counsel.



Assistant Attorney General

APPENDIX

OPINION RENDERED: February 20, 1987; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 85-CA-2211-MR

RECEIVED
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OFFICE

MICHAEL L. MATTINGLY — APPELLANT

v.

ON REMAND FROM THE SUPREME COURT
APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NOS. 84-CR-152-1 & 197

COMMONWEALTH OF KENTUCKY — APPELLEE

REVERSING AND REMANDING

* * * * * *

BEFORE: COMBS, DUNN[1] and HOWARD, Judges.

COMBS, JUDGE. This case is before this court upon remand by the Kentucky Supreme Court for us to decide other issues not considered in our previous opinion. We had earlier reversed appellant's conviction as a second-degree persistent felon,

---

[1]Judge Dunn was designated as a Special Judge for this panel.

determining that the Commonwealth's evidence at the trial on that charge was insufficient, and because of that, retrial on the same charge violated the double jeopardy provisions of § 13 of the Kentucky Constitution, and the Fifth Amendment to the United States Constitution. The Commonwealth appealed to the Supreme Court which reversed our decision, finding only a trial error in the proceedings below. We now consider those other issues raised by appellant.

Appellant claims that the trial court erred when it permitted witnesses to testify who were not listed as witnesses during voir dire. Appellee points out that admission of witnesses is within the sound discretion of the trial judge. Woods v. Commonwealth, Ky., 305 S.W.2d 935 (1957). The argument here is over the admission of five witnesses appellee failed to list upon request by appellant during voir dire. Appellant claims that this allowance by the trial court inhibited his right to exercise his peremptory challenges.

Appellant's second assignment of error also concerns the jury. He says the trial court erred in excusing two jurors; one because her husband worked for a codefendant, and another because she was having out-of-town guests.

It has been held before that the fundamental right to an impartial jury demands that no trace of suspicion be permitted to impugn the impartial selection of a jury. Comm., Dep't of Highways v. Garland, Ky., 394 S.W.2d 450 (1965). The Commonwealth's failure to list these five witnesses, when called upon to do so, damaged appellant's ability to exercise his

peremptory challenges, and the trial court's allowing their testimony was an abuse of discretion.

We also believe the trial court erred when it excused a juror because she was having out-of-town guests. KRS 29A.100(1) permits the trial judge to excuse jurors upon a showing of "undue hardship, extreme inconvenience or public necessity." We do not believe this includes having guests. Appellee says such falls within the public necessity provision, and that this juror could not have been expected to keep her mind on the trial. If this excuse were to be condoned by this court we cannot but imagine how frequently jurors would be excused solely because they claimed to be preoccupied with any of a number of mundane concerns. Everyone has a personal life, but jurors, just as all others involved in a trial, are expected to temporarily put aside their personal concerns long enough to attend to the court's business at hand. We do not believe having guests is cause to excuse a juror, and believe the trial court erred in doing so.

Appellant's other assignments of error include the court's refusal to allow the sheriff to testify that the codefendant, who was not on trial, failed to identify appellant in a lineup conducted by the sheriff. We do not believe the trial court abused its discretion here in that the Commonwealth would have had no opportunity to cross-examine the codefendant because he had refused to testify.

Appellant claims error occurred when the trial court allowed a witness to testify who violated the rule of separation.

however, the only testimony this witness gave was given to establish chain of custody of a key, and did not touch upon the earlier testimony given in a way that would be an abuse of discretion to prejudice appellant. See Jones v. Commonwealth, Ky., 623 S.W.2d 226 (1981).

Appellant also contends that the prosecuting attorney misconducted himself in addressing the jury during closing argument. But we see nothing in the record other than the remarks asking the jury to send the community a message about crime and punishment. Like remarks have been held proper and we see no impropriety in these. See Wallen v. Commonwealth, Ky., 657 S.W.2d 232 (1983).

The judgment of the Pulaski Circuit Court is hereby reversed and this case is remanded for a new trial on the underlying conviction.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY

NO. _____
(COURT OF APPEALS NO. 85-CA-2211-MR)

COMMONWEALTH OF KENTUCKY — MOVANT

V. MOTION FOR DISCRETIONARY REVIEW OF A DECISION OF THE COURT OF APPEALS

MICHAEL L. MATTINGLY — RESPONDENT

* * * * * *

Comes the movant, Commonwealth of Kentucky, by counsel, pursuant to CR 76.20, and requests this Court to review the decision of the Court of Appeals in the case of Michael L. Mattingly v. Commonwealth of Kentucky, No. 85-CA-2211-MR (rendered February 20, 1987, Opinion to be Published).

JURISDICTIONAL FACTS

1. (a) The name of the respondent is Michael L. Mattingly.

(b) The name and address of the respondent's attorney is: Robert E. Gillum, P. O. Box 1147, Somerset, KY 42501-1147.

(c) The name of the movant is Commonwealth of Kentucky.

(d) The name and address of Movant's attorney is: Joseph R. Johnson, Assistant Attorney General, Capitol Building, Frankfort, KY 40601.

2. The date and final disposition of Movant's case by the Court of Appeals was February 20, 1987, and no Petition for Rehearing was filed by either Movant or Respondent.

3. The respondent is not free on bond pending appeal.

THE MATERIAL FACTS

This is the second time this case has been on Discretionary Review to this Court. The first time this Court reversed the Court of Appeals on the double jeopardy (See 86-SC-288-DG). The opinion (see appendix) found that the Court of Appeals erred in reversing Respondent's convictions as a second-degree PFO because the respondent was retried after evidence against him in the first trial was obtained over the telephone. This Court found only trial error instead of evidentiary insufficiency and therefore a second trial was not barred. The case was remanded to the Court of Appeals for consideration of the remaining issues not decided by the court the first time. The Court of Appeals for the second time has reversed and remanded this case, and the Commonwealth brings this Motion for Discretionary Review a second time in the same case.

The respondent was convicted of receiving stolen property over $100 and second-degree persistent felony offender, and his punishment was fixed at ten (10) years' imprisonment.

The first Commonwealth witness was Elizabeth Poynter (Transcript of Evidence, hereinafter TE, 60). She stated that

on the morning of August 1, 1984, she saw a tractor trailer go by her house with three (3) Ford tractors on it (TE I, 61-62).

Dale Mink testified he talked to the police about seeing a large Ford U-Haul about Noon on August 1, 1984, (TE, 70).

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Wilbur Hannah testified he owns a farm machinery dealership and that three tractors were taken from his lot July, 1984, (TE, 151).

Officer Kenny Upchurch testified that after he got the report of the stolen tractors, he looked into the back of a U-Haul and saw the dried tractor tracks (TE, 162). The respondent was placed under arrest about 30 minutes later (TE, 164). He made a courtroom identification of the respondent (TE, 165). The Ford tractor key was found half-way between the driver's door and the end of the U-Haul (TE, 166). The key was handed to him by Jim Richardson, a volunteer fireman (TE, 172).

Det. Mike Walters with the Sheriff's Department testified that he took fingerprints of the tractor trailer (TE, 185). He also took a tar substance off the license tag (TE, 187). All evidence was sent to the crime lab in Frankfort (TE, 188).

The next witness was Jim McWhorter who testified he received debris samples and fingerprints from Det. Walters (TE, 194).

Det. Karl Clinard testified that he made plaster casts of some footprints (TE, 196). Det. McWhorter sent the casts to Frankfort (TE, 198).

Det. Doug Silvers testified he took soil samples from the area where the tractor trailer and three (3) farm tractors were found (TE, 203).

Barbara Wheeler at the Kentucky Crime Lab testified she received a left and right shoe plaster cast and soil samples (TE, 206).

Roger Heath testified that he saw a U-Haul truck on Blue John Road twice on the same day (TE, 228). He saw it go to Jim Goldson's house (TE, 230). Heath made an incorrect identification of the driver (TE, 231).

The next witness was Oma Claunch who saw the U-Haul on Elrod Road (TE, 247).

The next witness was Billy Price (TE, 261). He testified he also saw the U-Haul coming from Elrod Road (TE, 262).

The next witness was Potter Langdon who stated he saw a U-Haul truck on Blue John Road (TE, 272). About 5 to 10 minutes elapsed, and he saw it come back (TE, 274).

Russell Goff, a Pulaski County Deputy Sheriff, testified he became involved in the investigation from reports of a tractor trailer truck parked off the Elrod Road and a U-Haul making trips back and forth from it (TE, 281). The license number of the tractor-trailer was run through a computer, and it came back stolen. Id. The Ford tractor was found nearby in a clump of trees (TE, 282). The tractor was also found to be stolen (TE, 282). Two (2) tractors were found at Goldson's house, and they were found to be stolen (TE, 285).

The next witness was Sarah Goldson, the wife of Jim Goldson (TE, 302). She stated that she saw a vehicle which looked like a U-Haul outside her house (TE, 304).

Sheriff John Adams stated that he dispatched several officers to Elrod but did not go himself then (TE, 308). Later he went to the scene and read Respondent his rights (TE, 313). He identified a Ford tractor key which he received from Officer Upchurch (TE, 317).

Jim Richardson testified that he found a key alongside a street in Burnside (TE, 325). The object was found between the driver's door of the U-Haul truck and the street (TE, 339). He made an in-court identification of the key (TE, 340).

John Adams' testimony was put into evidence by avowal where he stated that Respondent was in a line-up and Goldson could not pick him out (TE, 343-344).

Det. Mike Walters identified a key that was given to him by Deputy Charles Thompson (TE, 346). Respondent's shoes were also taken in evidence (TE, 347). He also received plaster casts from Karl Clinard which were placed in a box with the rest of the evidence (TE, 348). All of the evidence was given to Det. McWhorter to transport to Frankfort (TE, 349).

Ronnie Freels who works for the crime lab testified he received athletic shoes and a plaster cast from Detective McWhorter (TE, 355-356).

Deputy Sheriff Charles Thompson testified that he was handed a key to a Ford tractor at Burnside by John Adams (TE, IV, 373). He gave the key to Mike Walters. Id.

The defense then presented its case and called Officer Kenneth Upchurch to the stand (TE IV, 377).

The jury found the respondent guilty of receiving stolen property over $100 and his punishment was fixed at five (5) years' imprisonment (TE IV, 433).

At the PFO phase of the trial, Det. Mike Walters testified that he processed Respondent after he was arrested and his birthdate was 5/3/45 (TE IV, 441).

Probation and Parole Officer Ann Dick testified that Mattingly had previously been convicted in Hardin County of

attempt to commmit first-degree robbery, and he was sentenced to six (6) years imprisonment on April 26, 1976, (TE IV, 443). She stated she obtained all this information from a telephone call (TE IV, 445).

A jury verdict found Respondent guilty on the PFO count and his punishment was fixed at ten (10) years' imprisonment (TE IV, 451). The court granted a new trial of the PFO phase pursuant to Respondent's motion. (TE IV, 456).

Ann Dick testified the respondent was found guilty of receiving stolen property over $100 and received five (5) years' imprisonment (TE IV, 469).

Walter Butler with the Department of Probation and Parole in Elizabethtown testified that he could identify Respondent since he was his probation officer in Hardin County (TE IV, 474). Respondent was convicted of robbery in the first degree and received a six (6) year sentence (TE IV, 475). He was shock probated on October 27, 1977, and the probation period expired October 23, 1982. Id. The date of the offense was January 6, 1976, and date of birth was May 3, 1945, (TE IV, 476). The crime was committed on January 6, 1976, and the date of conviction was March 19, 1976. Id.

Barbara Mattingly testified for the defense (TE IV, 481). She stated her husband has multiple sclerosis but it is now in remission (TE IV, 489-490).

On the respondent's own admission, he filed the grounds and motion for a new trial. (TE IV, 456). It has been held that double jeopardy does not prevent retrial when a new trial is granted at the request of the defendant. Oregon v. Kennedy, 456 U.S. 667 (1982); Allen v. Commonwealth, Ky., 114 S.W.2d 757 (1938).

QUESTION OF LAW INVOLVED

WHETHER THE TRIAL COURT ERRED IN REVERSING THIS RESPONDENT'S CONVICTION WHERE TWO (2) JURORS WERE EXCUSED AND FIVE (5) WITNESSES TESTIFIED WHO WERE NOT LISTED AS WITNESSES DURING VOIR DIRE WHEN THE RESPONDENT HAS FAILED TO SHOW ANY PREJUDICE WHATSOEVER.

SPECIAL REASON FOR DISCRETIONARY REVIEW

THIS COURT SHOULD GRANT THIS MOTION FOR DISCRETIONARY REVIEW WHERE THE COURT OF APPEALS REVERSED BECAUSE TWO (2) JURORS WERE EXCUSED EVEN THOUGH THIS CAME UNDER "PUBLIC NECESSITY PROVISION" OF KRS 29A.100(1) AND FIVE WITNESSES TESTIFIED WHO WERE NOT LISTED DURING VOIR DIRE.

ARGUMENT

THE TRIAL COURT PROPERLY PERMITTED WITNESSES TO TESTIFY AND PROPERLY EXCUSED TWO PROSPECTIVE JURORS.

It has been held that the admission of witnesses, like evidence, lies within the sound discretion of the trial court. Woods v. Commonwealth, Ky., 305 S.W.2d 935 (1957). In the case at bar, the trial court exercised its discretion in allowing these witnesses to testify.

Price and Claunch were first brought to the attention of the Commonwealth by defense counsel himself (TE, 244). As to Roger Heath, his name appears on the indictment (Transcript of Record, TR, 1; TE, 93). As to Richardson, the only purpose of his testimony was to trace the chain of custody of a key. There was no possible prejudice to the respondent by allowing this witness to testify. The trial court has wide discretion where no actual prejudice is shown. Jones v. Commonwealth, Ky., 623 S.W.2d 226 (1981). The Court of Appeals erred in finding prejudice when on the facts of this case none, in fact, existed.

KRS 29A.100(2) states that it is absolutely discretionary for the trial judge to excuse a juror from service entirely. This statute is consistent with Kentucky case law that the trial court has wide discretion in deciding whether to strike a juror for cause. Caldwell v. Commonwealth, Ky., 634 S.W.2d 405 (1982); Iles v. Commonwealth, Ky., 455 S.W.2d 533 (1970); White v. Commonwealth, Ky., 671 S.W.2d 241 (1983); Scruggs v. Commonwealth, Ky., 566 S.W.2d 405 (1978).

As to the first juror, it was established that her husband worked for a co-defendant. This was prima facie evidence of prejudice. However, prejudice need not be established--only "public necessity". KRS 29A.100(1). As to the second, a juror who had her mind on out-of-town guests could not be expected to keep her mind on the trial.

In summary, as to the five (5) witnesses who were allowed to testify although not listed at voir dire, the facts show that there was no prejudice to the respondent by allowing them to testify. In any event, the matter was within the trial court's discretion. As to the two (2) jurors who were excused, this also was within the trial court's discretion and within the public necessity doctrine.

CONCLUSION

For the foregoing reasons, the movant requests this Court to grant its Motion or Discretionary Review in this case for a second time.

Respectfully submitted,

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COUNSEL FOR MOVANT

NOTICE

Notice is hereby given that a copy of the foregoing Motion for Discretionary Review will be filed with the Clerk of the Supreme Court of Kentucky on this 6th day of March, 1987.

Joseph R. Johnson
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Discretionary Review has been mailed, postage prepaid, to Hon. Robert E. Gillum, P. O. Box 1147, Somerset, KY 42501-1147, Counsel for Respondent; Hon. Benny E. Ham, Commonwealth Attorney, P. O. Box 763, Somerset, KY 42501; and Hon. John C. Scott, Clerk , Court of Appeals, Bush Building, Wapping Street, Frankfort, KY 40601, this 6th day of March, 1987.

Joseph R. Johnson
Assistant Attorney General

KRS 532.080

PERSISTENT FELONY OFFENDER SENTENCING

(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (6) of this section shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.

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